

# Exhibit A

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8 UNITED STATES DISTRICT COURT  
9  
10 CENTRAL DISTRICT OF CALIFORNIA

11 FOREMOST GROUPS, INC. f/k/a  
12 FOREMOST INTERNATIONAL  
13 TRADING CO., INC.,

Plaintiff,

vs.

15 AYERS BATH (USA)  
16 CORPORATION,

Defendant.

Case No. CV11-7473 GAF (Ex)  
Hon. Gary A. Feess  
Courtroom 740

**BRIEF IN FURTHER SUPPORT OF  
APPLICATION FOR PRELIMINARY  
INJUNCTION**

Hearing Date: November 21, 2011  
Hearing Time: 9:30 a.m.  
Hearing Location: Courtroom 740

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21 **I. PRELIMINARY STATEMENT**

22 Plaintiff Foremost Groups, Inc. f/k/a Foremost International Trading Co., Inc.  
23 (“Foremost” or “Plaintiff”) respectfully submits this reply brief in further support of  
24 its request for the entry of a Preliminary Injunction pursuant to Fed. Rules Civ. P.  
25 65 restraining and enjoining Defendant Ayers Bath (USA) Corporation (“Ayers” or  
26 “Defendant”) and its officers, agents, servants, employees, and all those in active  
27 concert or participation with Defendant, from (1) selling, distributing and/or  
28 offering for sale all Tangshan Huida Ceramic Group Co., Ltd. (“Huida”) products,

1 including but not limited to toilets and kitchen and bathroom sinks, in the  
2 United States and Canada in violation of Foremost's exclusive distribution  
3 agreement; and (2) infringing on Foremost's unique MaP Label.

4 In its application, Foremost demonstrated the factors necessary for injunctive  
5 relief because Foremost is confronted with the prospect of substantial harm if  
6 Ayers' unrelenting unlawful conduct is permitted to continue unabated. Indeed, it  
7 required the commencement of this action to force Ayers to cease, for the time  
8 being at least, its sale of toilets with packaging containing the Foremost MaP Label.  
9 Ayers' promise to no longer use the Foremost MaP Label going forward of course  
10 has no impact on the thousands of Ayers' toilets bearing the infringing mark  
11 currently sitting on stores shelves across the country, the sale of which irreparably  
12 harms Foremost.

13 Ayers attempts to defeat the clear implication that it is selling Huida-  
14 manufactured toilets by repeating that its toilets are manufactured by Tangshan  
15 Ayers. Far from being a separate and distinct company from Huida, Tangshan  
16 Ayers is affiliated with Huida and dependent on Huida for the production of  
17 bathroom and sanitary products. Ayers' promotional materials expressly  
18 acknowledged this fact until recently, when all mentions of Huida were  
19 mysteriously deleted.

20 Ayers is apparently unwilling to cease its infringement on Foremost's  
21 exclusive right of distribution and tortious interference with Foremost's business  
22 relationships, instead choosing to perpetuate the fiction that its toilets are  
23 manufactured by Tangshan Ayers, not Huida, and therefore not within the scope of  
24 the Exclusive Distribution Agreement. Accordingly, this Court should grant  
25 Foremost's application for preliminary injunctive relief.

26 **II. COUNTER-STATEMENT OF FACTS**

27 Foremost supplements the Statement of Facts submitted with its Application  
28 for Preliminary Injunction with the following additional information.

1 Ayers claims that all of its porcelain toilet and sink products sold in the  
2 United States are manufactured by Tangshan Ayers Bath Equipment Co., Ltd.  
3 (“Tangshan Ayers”). See Declaration of Peter Yao (“Yao Decl.”) at ¶ 5 [Docket  
4 No. 16-2]. Huida owns seventy-five (75%) percent of Tangshan Ayers. See  
5 Supplemental Declaration of David Bruce (“Bruce Supp. Decl.”) at ¶ 2, Ex. A. The  
6 Legal Representative/Business Owner of Huida, Huei-wen Wang, was the Legal  
7 Representative of Tanghsan Ayers until June 28, 2007. See id. at ¶¶ 2-3, Exs. A and  
8 B. The current Legal Representative of Tangshan Ayers is Yen-ching Wang. See  
9 id. at ¶ 2, Ex. A. Yen-ching Wang is the son of Huei-wen Wang. See id. at ¶ 4.  
10 Yen-ching Wang is also designated in the Exclusive Distribution Agreement as  
11 Huida’s assigned liaison. See Declaration of David Bruce (“Bruce Decl.”) at ¶ 7,  
12 Ex A. [Docket No. 6].

13 Until recently, Ayers’ promotional materials described Ayers as a “wholly  
14 owned corporation of Tangshan Ayers LTD which is a sister company to  
15 Huida Ceramic Groups LTD.” See Bruce Suppl. Dec. ¶ 5, Ex. C. Ayers went on to  
16 state that: “Through the affiliation of our sister company, we have the capacity to  
17 produce over 9 million pieces of products annually with 17 natural gas fed tunnels  
18 kilns and 10,000 workers more or less.” See id. The materials have since been  
19 amended to remove the references to Tangshan Ayers and Huida, though it  
20 continues to attribute Ayers’ production of bathroom and sanitary products to the  
21 “affiliation of [Tangshan Ayers’] sister company,” i.e. Huida. See id. at ¶ 6, Ex. D.

22 On July 26, 2011, David Bruce, the Executive Vice President of Foremost,  
23 purchased two (2) Ayers’ branded toilets from an Menards’ store in Indiana. See  
24 id. at ¶ 7. In addition to being virtually identical in physical appearance to Huida-  
25 manufactured toilets sold by Foremost, the toilets contain parts manufactured by  
26 Huida. See id. at ¶ 8, Ex. E. Below is a picture of a Huida-manufactured flush  
27 valve assembly found in an Ayers’ toilet purchased from Menards:  
28



See *id.* at ¶ 8, Ex. E. Menards bought 40,000 pieces of product from Ayers. See *id.* at ¶ 9.<sup>1</sup>

## LEGAL ARGUMENT

### **A. FOREMOST IS REASONABLY LIKELY TO SUCCEED ON THE MERITS OF ITS CLAIM AGAINST AYERS**

Foremost has shown a reasonable likelihood of success on the merits of its claims against Ayers. Contrary to Ayers' assertions in its opposition, Foremost's application sets forth sufficient factual and legal grounds to substantiate claims for infringement on Foremost's exclusive right of distribution, tortious interference with Foremost's prospective economic advantage, tortious interference with Foremost's contractual relations, unfair competition and infringement of Foremost's unregistered trademark.

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<sup>1</sup> Ayers has made numerous evidentiary objections to the Declaration of Mr. Bruce. Mr. Bruce will be attending the November 21, 2011 hearing and will be available to testify to the facts as set forth in his Declaration and Supplemental Declaration.

1           **1. Foremost Has Established a Reasonable Probability of**  
2           **Success on Its Claims for Infringement on Exclusive Right of**  
3           **Distribution and Tortious Interference with Prospective**  
4           **Economic Advantage**

5           By importing Huida-manufactured products and offering those products for  
6           sale to retail stores, wholesale channel and regional dealers in the United States  
7           with whom Foremost enjoyed a business relationship or sought to develop one,  
8           Ayers has, and continues to, infringe on Foremost's exclusive right of distribution  
9           and tortiously interfere with Foremost's business relations with prospective retail  
10          stores, wholesale channels and regional dealers. In its opposition, Ayers represents  
11          that the porcelain toilets it distributes are manufactured by Tangshan Ayers, not  
12          Huida, and therefore its distribution is not a violation of Foremost's exclusive right  
13          of distribution. See Yao Decl. at ¶ 5. Ayers also claims that it has not interfered  
14          with any economic relation of Foremost's. Neither claim withstands scrutiny.

15          In investigating the relationship between Ayers, Tangshan Ayers and Huida,  
16          Foremost discovered that Huida owns seventy-five (75%) percent of Tangshan  
17          Ayers. See Bruce Supp. Decl. at ¶ 2, Ex. A. Huida's Legal  
18          Representative/Business Owner, Huei-wen Wang, was the Legal Representative for  
19          Tangshan Ayers until June 2007. See Bruce Supp. Decl. at ¶¶ 2-3, Exs. A and B.  
20          Tangshan Ayer's current Legal Representative is Yen-ching Wang, Huei-wen  
21          Wang's son. See Bruce Supp. Decl. at ¶¶ 2, 4, Ex. B. Yen-ching Wang is also  
22          identified in the Exclusive Distribution Agreement as the assigned liaison for  
23          Huida. See Bruce Dec. at ¶ 7, Ex. A.

24          Ayers expressly acknowledged the connection between Tangshan Ayers and  
25          Huida in promotional materials and advertisements ("Ayers Bath (USA)  
26          Corporation is a wholly owned corporation of Tangshan Bath LTD which is  
27          a sister company to Huida Ceramic Groups LTD") until the materials were recently  
28          scrubbed, presumably in response to the commencement of this litigation. See id.  
            at ¶ 5, Ex. C. Ayers' promotional materials continue to contain the following

language: “***Through the affiliation of our sister company***, we have the capacity to produce over 9 million pieces of products annually with 17 natural gas fed tunnels kilns and 10,000 workers more or less.” See id. at ¶ 6, Ex. D (emphasis added).

Given the above, it now appears clear that Ayers’ distribution of Huida-manufactured toilets is in furtherance of an unlawful scheme between Ayers, Tangshan Ayers and Huida to deprive Foremost of its rights under the Exclusive Distribution Agreement. While Ayers asserts that its toilets are manufactured by Tangshan Ayers, as recently as March 11, 2011 Ayers’ promotional materials attributed Tangshan Ayers’ production of bathroom and sanitary products to its affiliation with Huida. See Bruce Supp. Decl. at ¶ 5, Ex. CB. The factual circumstances lead one to the inescapable conclusion that the bathroom and sanitary products being sold by Ayers in the United States are manufactured by Huida.

Ayers attempts to defeat the obvious implication that it is distributing Huida-manufactured products in violation of the Exclusive Distribution Agreement by pointing out superficial differences between Ayers’ toilets and what Ayers claims is a toilet sold by Foremost. As an initial matter, it is highly unlikely that the pictures attached to the Declaration of Jeffrey S. Renzi (“Renzi Decl.”) actually depict a toilet manufactured by Foremost. Mr. Renzi states that he visited a Home Depot home improvement store located at 1675 Wilshire Boulevard, Los Angeles, California and purchased a two-piece toilet sold as “Glacier Bay 2-Piece High-Efficiency Elongated All in One Toilet with Left Tank Lever in Chrome.” See Renzi Decl. at ¶ 9 [Docket No. 16]. Mr. Renzi proceeded to compare the “Glacier Bay” toilet with an Ayers’ toilet of similar height and flush performance in an effort to demonstrate that the Ayers’ toilet differed from the toilet purportedly sold by Foremost. See id. at ¶ 10.

While it is true that Foremost provides Home Depot with vitreous china toilets that are subsequently offered to customers under the brand “Glacier Bay,” Foremost is only one of a number of manufacturers that do so. See Bruce Supp.

1 Decl. at ¶ 10.<sup>2</sup> Foremost does not ship any vitreous china toilets to the Home Depot  
2 regional distribution center that supplies the Home Depot home improvement store  
3 located at 1675 Wilshire Boulevard in Los Angeles. See id. at ¶ 12. It is therefore  
4 unlikely that the “Glacier Bay” toilet purchased by Mr. Renzi was sold by  
5 Foremost. Accordingly, Ayers cannot rely on the comparison photographs attached  
6 to Mr. Renzi’s declaration as evidence that Ayers’ toilets differ materially from  
7 toilets sold by Foremost.

8 Moreover, to the extent it was unclear in Foremost’s moving papers, *Ayers’*  
9 ***toilets being sold at Menards contain Huida-manufactured component parts.*** See  
10 Bruce Supp. Decl. at ¶ 8, Ex. D. Ayers does not deny that its toilets contain such  
11 parts, but rather argues that: (1) non-porcelain parts are not within the scope of the  
12 Exclusive Distribution Agreement; and (2) Foremost has used non-Huida plastic  
13 parts in toilets distributed under the “Glacier Bay” name. With respect to the  
14 second argument, as discussed above, it does not appear as if Ayers examined any  
15 Foremost toilets sold under the “Glacier Bay” name, regardless it is irrelevant what  
16 parts Foremost may use in its toilets.

17 Concerning the first argument, the scope of the Exclusive Distribution  
18 Agreement is not, as Ayers contends, limited to porcelain products. Rather, the  
19 Exclusive Distribution Agreement grants Foremost the exclusive right to distribute  
20 “Type C Products” in North America. See Bruce Decl. at ¶ 7, Ex. A. The term  
21 “Type C Products” is defined in the Exclusive Distribution Agreement as  
22 “[i]ndicating the products designed and manufactured all by [Huida].” See id. at ¶  
23 7, Ex. A. Neither the exclusive distribution clause nor the definition of “Type C  
24 Products” limits the scope of the Exclusive Distribution Agreement to porcelain  
25 products. The component parts contained in Ayers’ toilets are clearly stamped with  
26 \_\_\_\_\_

27 <sup>2</sup> Each Home Depot “Glacier Bay” toilet carries the same stock-keeping unit or SKU identification  
28 code, regardless of manufacturer. See Bruce Supp. Decl. at ¶ 11. The SKU identification codes vary only  
between models. See id.

1 the designations “Huida” and “Tangshan Huida Ceramic Group Co., Ltd.” See  
2 Bruce Supp. Decl. at ¶ 8, Ex. E. Ayers’ distribution of any product designed and  
3 manufactured by Huida, including non-porcelain component parts, constitutes an  
4 infringement on Foremost’s exclusive right of distribution and tortious interference  
5 with prospective economic advantage.

6       Foremost alleges that Ayers infringed on its exclusive right of distribution  
7 and intentionally and/or negligently interfered with its prospective economic  
8 advantage by offering Huida-manufactured products for sale to retail stores,  
9 wholesale channel and regional dealers in the United States with whom Foremost  
10 enjoyed a business relationship or sought to develop one, including Ferguson,  
11 Lowe’s, HD Supply and Menards. Ayers supports its denials of wrongdoing with  
12 an extremely carefully worded declaration from Charles Wang, Ayers’ Vice  
13 President of Sales. With respect to Ferguson and Lowe’s, Wang does not deny that  
14 he or members of his sales team offered to sell these entities Huida-manufactured  
15 products. See Declaration of Charles Wang (“Wang Decl.”) at ¶¶ 4-5 [Docket No.  
16 16-3]. Rather, Wang states that neither he nor the members of his sales team “made  
17 any in person contacts” with Ferguson or Lowe’s to solicit sales. Foremost never  
18 claimed that Ayers’ representatives approached Foremost’s customers in person, in  
19 fact the documentary evidence obtained by Foremost suggests that Ayers’ typical  
20 practice was to solicit sales by email. See Bruce Decl. at ¶¶ 32-33, Ex B.

21       For example, upon being told by Todd Page, the International Merchandise  
22 Manager – Kitchen and Bath for LG Sourcing, Inc., a wholly-owned subsidiary of  
23 Lowe’s, that someone from Ayers had approached Lowe’s with an offer to sell  
24 them Huida-manufactured products, Bradley Rannow of Foremost asked Mr. Page  
25 for the name of the Huida representative and the method of approach. See id. at ¶  
26 32, Ex B. Mr. Page replied that he received an email from Ben Liu. See id. at ¶ 33,  
27 Ex C. In his declaration, Wang claims that “Ben Liu is not an Ayers Bath  
28 employee.” See Wang Decl. at ¶ 6. This statement is hardly sufficient to establish

1 that Ben Liu was not an employee of Ayers in April 2011 when he approached  
2 Lowe's with an offer to sell them Huida-manufactured products.

3 Wang's claim that "there are no sales or purchase orders for Ayers Bath  
4 products between Ayers Bath" and Ferguson or Lowe's is similarly eyebrow-  
5 raising. See Wang Decl. at ¶¶ 4-5. Wang does not state that Ayers has never sold  
6 products to Ferguson or Lowe's, or that Ayers did not sell products to Ferguson or  
7 Lowe's during the relevant time periods. Wang merely states that there are  
8 currently no outstanding orders between Ayers and Ferguson and Lowe's. If true,  
9 this is hardly surprising. Following the commencement of this action, Ayers  
10 purged its promotional materials of all references to Huida and ceased its use of the  
11 Foremost MaP Label. See Bruce Supp. Decl. at ¶¶ 5-6, Exs. C and D; Wang Decl. at  
12 ¶ 8. It is clear that Ayers is desperate to appear blameless before the Court,  
13 temporarily halting sales to the customers identified by Foremost would be entirely  
14 consistent with Ayers' course of conduct up to this point.

15 Messrs. Wang and Yao claim to have not seen a copy of the Exclusive  
16 Distribution Agreement prior to this lawsuit, but do not deny having knowledge of  
17 its existence or Foremost's reasonable expectation of economic benefit from  
18 exclusively selling Huida-manufactured products. See Wang Decl. at ¶ 9; Yao  
19 Decl. at ¶ 8. Such a denial would prove troublesome, as it is an uncontradicted fact  
20 that Ayers was put on notice on April 21, 2011 that Foremost had an exclusive right  
21 of distribution of Huida products in the United States and that Ayers' attempts to  
22 sell Huida products constituted infringement of Foremost's exclusive right of  
23 distribution. See Bruce Decl. at ¶ 43, Ex. C.

24 Following the receipt of the April 21, 2011 notification, Ayers had  
25 knowledge of the economic advantage Ayers derived from its exclusive sale of  
26 Huida-manufactured products in the United States and Canada. See id. at ¶ 43, Ex.  
27 C. While Ayers is correct that, in order to recover for intentional or negligent  
28 interference with prospective economic advantage, a plaintiff must plead and prove

1 “the defendant's interference was wrongful ‘by some measure beyond the fact of the  
2 interference itself,’” see Della Penna v. Toyota Motor Sales, U.S.A., Inc., 11  
3 Cal.4th 376, 392–393, 902 P.2d 740 (1995) (citations omitted), “an act is  
4 independently wrongful if it is unlawful, that is, if it is proscribed by some  
5 constitutional, statutory, regulatory, common law, or other determinable legal  
6 standard .... an act must be wrongful by some legal measure, rather than merely a  
7 product of an improper, but lawful, purpose or motive.” Korea Supply Co. v.  
8 Lockheed Martin Corp., 29 Cal.4th 1134, 1159, 63 P.3d 937 (2003) (citations  
9 omitted). In selling Huida-manufactured toilets to Menards despite its knowledge  
10 of Foremost’s exclusive right or distribution, Ayers intentionally and wrongfully  
11 interfered with Ayer’s prospective economic advantage, resulting in a lost sales  
12 opportunity. See Bruce Decl. at ¶¶ 50-54.

13 The cumulative weight of the evidence compels a finding that Foremost is  
14 likely to succeed on the merits of its claim for infringement on exclusive right of  
15 distribution and tortious interference with prospective economic advantage. The  
16 toilets sold by Ayers to retailers such as Menards are virtually identical to  
17 Foremost’s Huida-manufactured toilets and contain component parts admittedly  
18 and undeniably manufactured by Huida. See Bruce Dec. at ¶ 51, Ex. G; Bruce  
19 Supp. Decl. at ¶ 8, Ex. E. Tangshan Ayers is owned by Huida. Bruce Supp. Decl.  
20 at ¶ 2, Ex. A. The companies’ principals overlapped during all relevant periods.  
21 See Bruce Dec. at ¶ 7, Ex. A; Bruce Supp. Decl. at ¶ 3, Ex. B. Ayers’ promotional  
22 materials expressly acknowledged the relationship between Ayers, Tangshan Ayers  
23 and Huida and attributed Tangshan Ayers’ products to its affiliation with Huida  
24 until it was recently modified to remove the incriminating statements. See Bruce  
25 Supp. Decl. at ¶¶ 5-6, Exs. C and D. Ayers offered Huida-manufactured products  
26 for sale to retail stores, wholesale channel and regional dealers in the United States  
27 with which Foremost had a business relationship or sought to enter into one,  
28

1 resulting in lost business opportunities for Foremost. See Bruce Decl. at ¶¶ 23, 28,  
2 32, 38 and 49-50.

3 Based on the foregoing, Foremost has demonstrated a likelihood of success  
4 on the merits on its claims for infringement on exclusive right of distribution and  
5 tortious interference with prospective economic advantage.

6 **2. Foremost Has Established a Reasonable Probability of  
7 Success on Its Claim for Tortious Interference with  
Contractual Relations**

8 Ayers' opposition to Foremost's claim for tortious interference with  
9 contractual relations rests on its that assertion Ayers' products are not manufactured  
10 by Huida. However, as discussed at length above, the facts prove otherwise.  
11 According to Ayers, all of its toilets and sink products are manufactured by  
12 Tanghsan Ayers. See Yao Decl. at ¶ 5. Given the overlapping corporate structure  
13 between Tanghsan Ayers and Huida and Ayers' previous admission that Tangshan  
14 Ayers' production of bathroom and sanitary products is only possible due to its  
15 affiliation with Huida, it is apparent that Tangshan Ayers is obtaining products  
16 from Huida. See Bruce Supp. Decl. at ¶¶ 2-5, Exs. A, B and C. As an active  
17 participant in this artifice, Ayers is liable for tortious interference with  
18 contractual relations.

19 Ayers' denial of knowledge of the Exclusive Distribution Agreement also  
20 rings hollow. As an initial matter, the relationship between Ayers, Tangshan Ayers  
21 and Huida not only suggests that Ayers would have full knowledge of Huida's  
22 commitment to Foremost as its exclusive distributor of products in North America,  
23 but that Ayers was the vehicle through which Huida sought to circumvent its  
24 contractual obligations. At the time he signed the Exclusive Distribution  
25 Agreement on behalf of Huida, Huei-wen Wang was also serving as Tangshan  
26 Ayer's legal representative. See Bruce Decl at ¶ 7, Ex. A; Bruce Suppl. Decl. at  
27 ¶ 2, Ex. A. Huei-wen Wang's son, Yen-ching Wang, who is identified in the  
28 Exclusive Distribution Agreement as the "assigned liaison" for Huida, is the current

1 Legal Representative of Tangshan Ayers. See Bruce Decl at ¶ 7, Ex. A; Bruce  
2 Suppl. Decl. at ¶¶ 2, 4, Ex. A. Even if Peter Yao had “not seen a copy of the  
3 [Exclusive Distribution Agreement]” prior to the initiation of this lawsuit, as he  
4 claims in his Declaration, it is ludicrous to think that, as a former executive of  
5 Tangshan Ayers, he would have been unaware of its existence. See Yao Decl. at ¶  
6 8. In addition, it is undisputed that Ayers had knowledge of Foremost’s exclusive  
7 right of distribution of Huida products in the United States and Canada in April  
8 2011. See Bruce Decl. at ¶ 44, Ex. C.

9 In representing to retail stores and wholesale distributors that Ayers had the  
10 right to import and distribute Huida products in the United States, despite its actual  
11 knowledge of the Exclusive Distribution Agreement, Ayers undermined Foremost’s  
12 contractual relationship with Huida. See Bruce Decl. at ¶ 40. Based on the  
13 foregoing, there is a high likelihood of success on the merits on Foremost’s claim  
14 that Ayers tortiously interfered with Foremost’s contractual relations. See  
15 Queliman v. Stewart Title Guar. Co., 19 Cal.4th 26, 55, 960 P.2d 513 (1998).

16           **3. Foremost Has Established a Reasonable Probability of  
17 Success on Its Claims Grounded in Trademark Law**

18           Foremost believes it will ultimately prevail on the merits of its trademark  
19 infringement claims because: (1) Foremost owns the Foremost MaP Label; (2)  
20 Ayers is using the Foremost MaP Label without authorization; and (3) Ayers’  
21 infringing use of the Foremost MaP Label is likely to cause confusion. Ayers seeks  
22 to avoid culpability for its infringement of the Foremost MaP Label on a number of  
23 grounds, none of which can withstand scrutiny.

24           **a. The Trademark Infringement Issue is Not Moot**

25           Ayers claims that it has ceased to place the Foremost MaP Label on  
26 packaging for Ayers’ toilets and therefore the issue of trademark infringement is  
27 now moot. This is incorrect. As an initial matter, without an order from the Court,  
28 there is nothing stopping Ayers from renewing its infringing use of the Foremost

MaP Label at any time in order to trade off the success Foremost has achieved as a result of its use of the Foremost MaP Label and years of distributing vitreous china products. More pressing, however, are the thousands of Ayers' toilets bearing the Foremost MaP Label currently sitting on shelves of retailers across the country.

Foremost first learned of Ayers' use of the Foremost MaP Label when it purchased two (2) Ayers' toilets from Menards that carried the infringing mark. See Bruce Decl. at ¶ 52, Ex. F. Menards bought 40,000 pieces of product from Ayers. See Bruce Supp. Decl. at ¶ 9. Given the volume of Ayers' toilets bearing the Foremost MaP Label that likely remain in the marketplace, Ayers' assurance that "as of [October 25, 2011], none of the packaging for the products *at Ayers Bath's warehouses* has the [Foremost MaP Label]" provides little comfort. See Wang Decl. at ¶ 8 (emphasis added). Foremost is entitled to the entry of a preliminary injunction ordering Ayers to remove all toilets carrying the offending packaging from stores.

**b. Foremost Has a Valid Trademark**

Ayers' arguments that Foremost does not make an adequate showing that it has a valid trademark fail as a matter of law. In quoting Professor J. Thomas McCarthy's treatise *McCarthy on Trademarks and Unfair Competition*, Ayers confuses his comments on the functions of a trademark with the requirements of a trademark. The requirements for trademark protection are clearly set forth in section 45 of the Lanham Act. 15 U.S.C. § 1447. A trademark is a "word, name, symbol, or device, or any combination thereof" that is adopted and used by a manufacturer or merchant in commerce "to identify and distinguish [its] goods, including a unique product, from those manufactured or sold by others and to indicate the source of the goods, even if that source is unknown." See id. The Foremost MaP Label is a symbol that Foremost has used in commerce since 2007 to communicate that the toilets that Foremost sells meet the industry's highest

1 standard for testing and certification. See Bruce Decl. at ¶ 14. The Foremost MaP  
2 label is thus entitled to protection as a trademark.

3 Ayers' argument that the Foremost MaP Label must serve to identify  
4 Foremost as the source of its goods is also incorrect as a matter of law. Section 45  
5 of the Lanham Act expressly acknowledges that a symbol may indicate the source  
6 of the goods, "even if that source is unknown." 15 U.S.C. § 1447. The symbol  
7 need does not need to explicitly reference Foremost in order to communicate the  
8 toilets' origin. See Qualitex Co. v. Jacobson Products Co., Inc., 514 U.S. 159, 163  
9 115 S.Ct. 1300 (1995). All toilets distributed by Foremost are packaged with the  
10 Foremost MaP Label. See Bruce Decl. at ¶ 15. Therefore, while the Foremost MaP  
11 Label does not specifically denote Foremost as the source of the toilets, the uniform  
12 presence of the Foremost MaP Label on packaging of toilets distributed by  
13 Foremost signifies the source of the toilets to the customer.

14 The Foremost MaP label also serves to signify "that all goods bearing the  
15 trademark are of an equal level of quality," see McCarthy, J. Thomas, *McCarthy on*  
16 *Trademarks and Unfair Competition*, § 3.2 (West 2011) (footnotes omitted)  
17 (hereinafter "McCarthy"), as each Foremost MaP Label communicates that the  
18 toilet has been subject to MaP testing and received the highest certification  
19 available. See Bruce Decl. at ¶ 13. Finally, the law does not require that the  
20 Foremost MaP Label serve the function of being a "prime instrument in advertising  
21 and selling" Foremost's products, but simply that it be used "to identify and  
22 distinguish [Foremost's] goods, including a unique product, from those  
23 manufactured or sold by others." 11 U.S.C. § 1447.

24 Accordingly, Foremost has established that the Foremost MaP Label is a  
25 valid trademark.

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**c. Ayers' Use of the Foremost MaP Label Creates a Likelihood of Confusion**

3 It is clear that Ayers' use of the Foremost MaP Label is likely to cause  
4 confusion in the minds of the public. The Ninth Circuit has held that the similarity  
5 of the marks in question, together with the relatedness of the goods or services and  
6 the use of a common marketing channel, constitute the "controlling troika in the  
7 [likelihood-of-confusion] analysis." GoTo.com, Inc. v. Walt Disney Co., 202 F.3d  
8 1199, 1205 (9th Cir. 2000). Here, the labels used by Foremost and Ayers do not  
9 "appear similar," they are identical. The second factor in the controlling subset  
10 also weighs heavily in Foremost's favor. Related or proximate goods are those  
11 "which compliment one another, are sold to the same class of consumers, or are  
12 similar in use and function." See Mallard Creek Indus. v. Morgan, 56 Cal.App.4th  
13 426, 436, 65 Cal.Rptr.2d 461 (Cal. Ct. App. 1997). Here, the products at issue are  
14 toilets, and thus could not be more related or proximate.

Finally, Foremost and Ayers rely on the same marketing channels to reach customers. “Convergent marketing channels increase the likelihood of confusion.” AMF, Inc. v. Sleekcraft Boats, 599 F.2d 341, 535 (9th Cir. 1979). Foremost and Ayers both reach customers through retail stores, wholesale channel and regional distributors that sell toilets.

In sum, an evaluation of the factors that make up the crucial body of the likelihood-of-confusion analysis demonstrate that Ayers' use of the Foremost MaP Label creates a substantial likelihood of confusion. Foremost is therefore likely to prevail on its claim for unfair competition under section 43 of the Lanham Act. Foremost is equally likely to prevail on its state law claims for unfair competition and infringement of unregistered trademark, as, under California law, a party's showing that it is likely to prevail on a federal claim for unfair competition is sufficient to establish that it is likely to succeed on the merits of its state law claims for unfair competition and trademark infringement. See *Truong Giang Corp. v.*

1       Twinstar Tea Corp., No. C 06-03594, 2007 WL 1545173, at \*4 (N.D. Cal. May 29,  
2       2007) (citing Cleary v. News Corp., 30 F.3d 1255, 1262-93 (9th Cir. 1994)).

3                   **B. FOREMOST SATISIFIED PRELIMINARY INJUNCTION  
4                   STANDARDS**

5       Ayers also contends that Foremost has failed to demonstrate irreparable harm  
6       because Foremost cannot point to any actual harm in the form of “tangible  
7       injuries.” [Docket No. 16 at 20:26]. Such actual harm is not necessary in  
8       trademark cases; where a likelihood of confusion is established, irreparable harm is  
9       presumed. See International Jensen, Inc. v. Metrosound U.S.A., Inc., 4 F.3d 819,  
10      822 (9th Cir.1993) (citing Vision Sports, Inc. v. Melville Corp., 888 F.2d 609, 613  
11      (9th Cir.1989)). Said another way, the law presumes, and does not require a  
12      trademark holder to show, that a likelihood of confusion causes a trademark holder  
13      to lose control over the infringed mark and lose the goodwill associated therewith.  
14      See, e.g., Apple Computer, Inc. v. Formula Int'l, Inc., 725 F.2d 521, 526 (9th Cir.  
15      1984). Thus, Foremost is suffering harm to its goodwill and trademark, and this is  
16      precisely the type of harm that makes a preliminary injunction warranted  
17      and necessary.

18       In addition, Ayers’ infringement on Foremost’s exclusive right of distribution  
19       and tortious interference with Foremost’s prospective economic advantage is  
20       causing Foremost to actually suffer immediate, irreparable harm to its reputation  
21       and goodwill. It is well-settled in the Ninth Circuit that the loss of goodwill and  
22       reputational harm constitute irreparable harm. See Ticketmaster L.L.C. v. RMG  
23       Technologies, Inc., 507 F.Supp.2d 1096, 1115 (C.D. Cal. 2008) (citations omitted);  
24       Metro-Goldwyn-Mayer Studios, Inc. v. Grokster, Ltd., 518 F.Supp.2d. 1197, 1215  
25       (C.D. Cal. 2007). Ayers solicited Foremost’s customers with offers to sell them  
26       Huida products at significantly lower costs. See Bruce Decl. As a result of Ayers’  
27       wrongful conduct, Foremost has lost business opportunities and been forced to  
28       mollify customers aggrieved by Ayers’ sale of products for which Foremost has the

1 exclusive right to distribute. See Bruce Decl. at ¶¶ 28, 35, 40, 50-54. Going  
2 forward, there is a danger that retailers and dealers will refuse to do any further  
3 business with Foremost.

4 Based on the foregoing, Foremost has sufficiently shown that Ayers'  
5 continuing egregious conduct will result in the loss of past and potentially future  
6 purchases of their vitreous china products. It is evident that Ayers' actions will  
7 result in the complete loss of Foremost's goodwill and reputation. If such actions  
8 are permitted to continue unhindered by judicial intervention, the negative impact  
9 and harm suffered by Foremost will be irreversible and unable to be remedied by  
10 monetary damages. A judgment for affirmative relief of damages after years of  
11 litigation could not begin to redress the resultant damage to Foremost. For these  
12 reasons, Foremost has established irreparable harm.

13 Moreover, the overwhelming hardship to Foremost in the instant matter  
14 provides an independent basis for the relief sought herein. See, e.g., Rodeo  
15 Collection, Ltd.v. West Seventh, 812 F.2d 1215, 1217 (9th Cir. 1987). Again,  
16 Foremost has suffered and will continue to suffer, both as a matter of fact and a  
17 matter of law, serious harm to its trademark and goodwill as a result of Ayers'  
18 unauthorized use of the Foremost MaP Label. Furthermore, the vast harm  
19 Foremost will continue to suffer if an injunction is not issued by virtue of Ayers'  
20 continued infringement on Foremost's exclusive right of distribution far outweighs  
21 any inconvenience or expense that Ayers may incur by being forced to comply with  
22 an injunction.

23 In evaluating the public interest, Ayers not only ignores the harm to  
24 Foremost, it also fails to acknowledge the public's interest in avoiding confusion  
25 and deception in the marketplace. Consumers will benefit by the issuance of a  
26 preliminary injunction as it will eliminate the danger of confusion about the source  
27 of the toilets they are purchasing and they will not mistakenly believe Ayers' toilets  
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1 bearing the Foremost MaP Label are somehow affiliated with or sponsored  
2 by Foremost.

3 **III. CONCLUSION**

4 For the foregoing reasons of fact and law, it is respectfully requested that the  
5 Court grant Foremost's application for a preliminary injunction.

6  
7 Dated: November 7, 2011

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